

**FILED**

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DISTRICT COURT  
DONA ANA COUNTY, NM

**STATE OF NEW MEXICO  
COUNTY OF DONA ANA  
THIRD JUDICIAL DISTRICT COURT**

**STATE OF NEW MEXICO, *ex rel*  
OFFICE OF THE STATE ENGINEER,**

**Plaintiff,**

v.

**ELEPHANT BUTTE IRRIGATION  
DISTRICT, et al.,**

**Defendants.**

**No. CV-96-888  
James J. Wechsler  
Presiding Judge  
SS No. 97-104  
United States Interests**

**SOUTHERN RIO GRANDE DIVERSIFIED CROP  
FARMERS ASSOCIATION'S RESPONSE TO  
UNITED STATES' MOTION FOR SUMMARY JUDGMENT**

**COMES NOW** Southern Rio Grande Diversified Crop Farmers Association ("SRGDCFA), by and through its attorneys, A. J. Olsen and Alvin F. Jones, Hennighausen & Olsen, L.L.P., pursuant to Rule 10-056 NMRA, and in response to the United States' ("U.S.") Motion for Summary Judgment wherein the U.S. seeks a decision declaring "that the source of Project water is (1) all the surface water in the lower Rio Grande, and (2) water in the ground hydrologically connected surface waters in the lower Rio Grande", and states as follows:

This Court should determine that the United States' Motion for Summary Judgment should be denied in all particulars. Further, pursuant to Movants' pending Motion to Dismiss in this matter, this Court should determine that the U.S. has not alleged nor can it prove that it owns any water rights, surface or groundwater in the lower Rio Grande.

It should be noted in this matter that El Paso Natural Gas Company, the City of Las Cruces, the State of New Mexico, Verde, New Mexico State University, Southern Rio Grande Diversified Crop Farmers Association and New Mexico Pecan Growers Association have all filed motions to dismiss the United States' claims to a groundwater right or a determination that groundwater is a source of water for the Rio Grande Project.

Movant, SRGDCFA has moved for a determination that the U.S. has not alleged sufficient facts to support a claim to any water rights in the lower Rio Grande surface or groundwater, other than a right to divert, store and deliver Rio Grande surface water from all its surface and diversion facilities within the Rio Grande Project.

#### ARGUMENT

1. The United States' Motion for Summary Judgment is premised upon what is called "United States' Statement of Undisputed Material Facts in Support of United States' Motion for Summary Judgment".

2. The United States' Statement of Undisputed Material Facts consists of 24 paragraphs that recite in part the early history of the development of the Rio Grande Project and the construction of Elephant Butte Dam and Reservoir, the history of the Reclamation Act, and reference a variety of source materials pertinent to the construction, operation, and maintenance of the Rio Grande Project, as well the Affidavit of Filiberto Cortez and Dr. Thomas Maddock, III.

3. Only the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, can form the grounds for Summary Judgment. *See*, NMRA 1-056(C). In this case, only the Affidavits of Cortez and Maddock can provide a basis for an alleged, undisputed material fact. The other materials referenced are not vouched for, or in anyway, tied to or supported by the sworn statements of the two witnesses Cortez and Maddock nor are they part of the discovery in this matter.

4. More importantly, nowhere in the alleged Statement of Undisputed Material Facts is there reference to any facts which would support the existence of a water right, surface or groundwater, belonging to the United States in the lower Rio Grande.

5. Consequently, the United States' Motion for Summary Judgment is fatally flawed in that it based on a Statement of Undisputed Material Facts which is silent on the single most important question of fact, does the United States have a groundwater or surface water right in the lower Rio Grande.

6. Nowhere in the voluminous materials attached by the United States in support of its Statement of Undisputed Material Facts or in any argument presented in support of its Summary Judgment, does the United States dispute the long established law in the State of New Mexico and in reclamation that the owners of the water rights in projects owned or operated by the United States are the individuals who are putting the water to beneficial use.

7. Beneficial use is the basis, the measure and the limit to the right of use of waters in the State of New Mexico. NMSA 1978 § 72-12-2 (1931).

8. The United States makes no claim to have at any point put any water to beneficial use in the lower Rio Grande.

9. Summary Judgment is only appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280.

10. In this case, the United States has not only failed to demonstrate that no genuine issues of material fact exist, it has completely failed to state any facts which form a basis for a claim, whether for a surface or a groundwater right.

11. The United States, having failed to state a factual basis for its claim to a groundwater right, has no basis for summary judgment determining that the United States has a right to groundwater as a source of supply for the Rio Grande Project.

Respectfully submitted,

**HENNIGHAUSEN & OLSEN, L.L.P.**

By: 

A. J. Olsen  
Alvin F. Jones  
Attorneys for Southern Rio Grande  
Diversified Crop Farmers Association  
P. O. Box 1415  
Roswell, NM 88202-1415  
(575) 624-2463 - telephone  
(575) 624-2878 - facsimile

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing *Southern Rio Grande Diversified Crop Farmers Association's Response to United States' Motion for Summary Judgment* was served on all parties on the attached Service List for Stream System Issue SS-104, via first class mail, this 21<sup>st</sup> day of June 2012.



Hennighausen & Olsen, L.L.P.

**SERVICE LIST FOR STREAM SYSTEM ISSUE SS-104 (United States Interests)****REBECCA A. DEMPSEY, ESQ.**

Cuddy & McCarty, L.L.P.  
P.O. Box 4160  
Santa Fe, NM 87502-4160  
505/988-4476

**TESSA T. DAVIDSON, ESQ.  
TATIANA ENGLEMANN-CORP**

Davidson Law Firm, L.L.C.  
P.O. Box 2240  
Corrales, NM 87048

**MARK F. SHERIDAN, ESQ.**

Holland & Hart, L.L.P.  
P.O. Box 2208  
Santa Fe, NM 87504

**JAMES SPEAR, JR., ESQ.**

300 E. Main Street, Suite 1032  
El Paso, TX 79901

**R. LEE LEININGER, ESQ.**

U.S. Dept. of Justice, ENRD  
South Terrace, Ste. 370  
999 18<sup>th</sup> St.  
Denver, CO 80202

**JOEL T. NEWTON, ESQ.**

1020 S. Main St.  
Las Cruces, NM 88005

**TANYA SCOTT, ESQ.**

**STEPHEN CURTICE, ESQ.**  
Law & Resource Planning Assoc.  
201 Third Street NW, Suite 1750  
Albuquerque, NM 87102-3368

**STEVEN L. HERNANDEZ, ESQ.**

**SAMANTHA R. BARNCASTLE, ESQ.**  
Law Office of Steven L. Hernandez, P.C.  
P.O. Box 13108  
Las Cruces, NM 88013

**MARIA O'BRIEN, ESQ.**

Modrall, Sperling, Roehl, Harris & Sisk  
P.O. Box 2168  
Albuquerque, NM 87103-2168

**A. J. OLSEN, ESQ.**

**ALVIN F. JONES, ESQ.**  
Hennighausen & Olsen, L.L.P.  
P. O. Box 1415  
Roswell, NM 88202-1415

**CLYDE A. PINE, JR., ESQ.**

Mounce, Green, Myers, et al.  
P.O. Drawer 1977  
El Paso, TX 79950-1977

**LAUREL A. KNOWLES, ESQ.**

**MARTHA C. FRANKS, ESQ.**  
**FRANCIS L. RECKARD, ESQ.**  
NM Office of the State Engineer  
P.O. Box 25102  
Santa Fe, NM 87504-5102

**ROBERT S. SIMON, ESQ.**

610 Gold Ave., SW, Ste. 111  
Albuquerque, NM 87102

**JOHN W. UTTON, ESQ.**

Sheehan & Sheehan, P.A.  
P.O. Box 271  
Albuquerque, NM 87103-0271

**JAY F. STEIN, ESQ.**

**SETH R. FULLERTON**  
Stein & Brockmann, P.A.  
P.O. Box 2067  
Santa Fe, NM 87504-2067

**CHRISTOPHER B. RICH, ESQ.**

U.S. Department of the Interior  
125 South State St. 6201 Federal Bldg.  
Salt Lake City, UT 84138

**VICTOR R. MARSHALL, ESQ.**

Victor R. Marshall & Assoc., P.C.  
12509 Oakland NE  
Albuquerque, NM 87122

**JAMES SCOTT BOYD**

16829 N. Sourdough Pl.  
Fountain Hills, AZ 85268

**IGNACIO L. BUSTAMANTE**  
2300 W. Union Avenue  
Las Cruces, NM 88005

**GEORGE J. WANT, JR.**  
1445 Los Pinos Way  
Anthony, NM 88021-8509

**MICHAEL R. CALDARELLA, SR.**  
3025 W. O'Hara Road  
Anthony, NM 88021

**GERALD A. WANT**  
2510 W. O'Hara Road  
Anthony, NM 88021

**ARMANDO CARRASCO**  
P.O. Box 11  
Chamberino, NM 88027

**CAROLYN ADAMS**  
P. O. Box 281  
San Miguel, NM 88004

**JANE J. FLEMING**  
c/o John Fleming, Representative  
P.O. Box 605  
Chamberino, NM 88027

**ROBERTO B. CARRASCO**  
P. O. Box 1  
Chamberino, NM 88027

**DALE J. HOPKINS**  
P.O. Box 247  
Organ, NM 88052

**SUEANNE G. KENNEY-NOZISKA**  
12305 Montes Road  
La Mesa, NM 88044

**WAYNE & REBECCA MILLER**  
7617 B Highway 28  
Anthony, NM 88021

**ROBERT NICHOLS**  
P.O. Box 1558  
Santa Teresa, NM 88008

**ROBERT J. NOZISKA**  
12305 Montes Road  
La Mesa, NM 88044

**ERNIE PROVENCIO**  
P.O. Box 1886  
Anthony, NM 88021

**MANUELITA B. ROSALES**  
14440 Highway 478 - S. Main  
Mesilla Park, NM 88047

**MARTINA H. & SAMMIE SINGH, SR.**  
P.O. Box 113  
La Mesa, NM 88044

**SAMMIE H. SINGH, JR.**  
P.O. Box 5  
Chamberino, NM 88027